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In The

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-[illegible]253

PHELPS CEMENT PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION,

Intervenor.

BRIEF OF INTERVENOR BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit err by applying the substantial evidence standard of review, instead of a "clear and convincing" evidence standard urged by the employer, in upholding the National Labor Relations Board's determination that petitioner Phelps Cement Products, Inc. violated Sections 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(5) and (1), by withdrawing recognition from the Union and refusing to bargain?

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In The

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OCTOBER TERM, 1982

NO. 82-100253

PHELPS CEMENT PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION,

Intervenor.

BRIEF OF INTERVENOR BRICKLAYERS, MASONS AND PLASTERERS' LOCAL UNION NO. 43 OF THE FINGERLAKES REGION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks review of a decision by the United States Court of Appeals for the Second Circuit which enforced the National Labor Relation Board's order directing that Phelps Cement Products, Inc. [the "Company"] cease and desist from, *inter alia,* refusing to recognize and bargain collectively with intervenor Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region [the "Union"].[1] The Union opposes the issuance of a writ of certiorari to review the Court of Appeals' decision because the decision below, that the Board's order was supported by substantial evidence, was clearly correct and there is no conflict among the circuits on an issue herein requiring resolution by this Court.

[1]The Union, as the charging party and successful party in the Board proceeding, was granted intervention by the Court of Appeals.

OPINIONS BELOW

References to the opinions and judgments delivered in the proceedings below are set forth in the petition at page 1.

JURISDICTION

The alleged jurisdictional requisites are set forth in the petition at page 2.

STATUTORY PROVISIONS INVOLVED

Sections 1, 7, 8(a)(1), 8(a)(5), 9(e), 9(f), 10(e), and 10(f) of the National Labor Relations Act, as amended, ["NLRA" or the "Act"], 29 U.S.C. §§151, 157, 158(a)(1), 158(a)(5), 159(e), 159(f), 160(e), and 160(f), are reprinted at IA-1 to IA-6 of the appendix to this brief.

STATEMENT OF THE CASE

Nature of the Case.

Petitioner Phelps Cement Products, Inc. seeks review of the decision of the United States Court of Appeals for the Second Circuit which enforced the order of the respondent National Labor Relations Board [the "Board"] against the Company. The Board adopted the recommended order of its Administrative Law Judge and directed the Company to cease and desist from, *inter alia*, refusing to recognize and bargain collectively with intervenor Bricklayers, Masons and Plasterers' Local Union No. 43 of the Fingerlakes Region.[2] Upon consideration of the Company's petition to review and set aside the order of the Board, the Court of Appeals found that the Board's order was supported by substantial evidence on the record considered as a whole and, therefore, granted the Board's cross-application for enforcement of the order.

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[2]Phelps Cement Products, Inc., 257 NLRB No. 4 (1981).

Course of the Proceedings Before the Board.

The complaint before the Board alleged that the Company violated Sections 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain, after having voluntarily recognized the Union and its majority status in an agreed upon bargaining unit on or about November 28, 1979.[3] After a trial, the Board's Administrative Law Judge concluded that the Company had voluntarily recognized the Union in an appropriate agreed upon bargaining unit, and that the Company had thereafter unlawfully withdrawn recognition and refused to bargain in violation of Sections 8(a)(5) and (1) [C.10].[4] The Board, by order dated July 21, 1981, adopted the Judge's decision in its entirety [B-1 to B-2].[5]

The Decision of the Court of Appeals.

The Company petitioned the United States Court of Appeals for the Second Circuit to review and set aside the order of the Board. The Board cross-petitioned for enforcement of its order. The Court of Appeals unanimously denied the Company's petition for review and granted the Board's cross-application for enforcement of its order. The Court of Appeals held that the Board's conclusion that the Company had voluntarily recognized the Union is supported by substantial evidence. In granting enforcement, the Court of Appeals declined the Company's invitation to impose a "clear and convincing" standard of evidence, rather than the "substantial evidence" standard, in reviewing Board determinations of voluntary recognition.

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[3]The Company admitted that the Union had requested the Company to bargain beginning on or about November 29, 1979.

[4]References in this form are to pages of the decision of the Administrative Law Judge, reprinted at Appendix C to the petition.

[5]Additionally, the Board granted the Union's motion to correct the transcript of the hearing. [B-1 n.1].

The Company's subsequent petition for rehearing and rehearing en banc was denied by the Court of Appeals. On August 12, 1982, the Company applied for a writ of certiorari to this Court seeking review of the Court of Appeals' decision.

The Facts.

In late October and November of 1979, James Walters, Business Representative of Local 43, was approached by an employee of the Company concerning the Union's possible organizing of the Company's cement block plant [C-3]. The employee, William Shattuck, explained that the men were talking about getting a union if they did not receive a sufficient wage increase. When the annual increase came out in November, most of the employees only received $.10 an hour. They were dissatisfied and went back to the Union and asked for representation [C-3]. Walters thereafter gave Shattuck authorization cards, told him the cards were to authorize the Union as the employees' collective bargaining representative, and said that if the employees wanted the Union to represent them they should sign the cards [C-3 n.3].

Shattuck returned the signed cards to Walters on November 13, 1979, at a meeting held at Shattuck's house that evening. Employees Shattuck, Schetrompf, Leisenring and Ernest Tillman, all employed by the Company, were present at the meeting. Schetrompf, Leisenring and Tillman signed their cards in the presence of James Walters [C-4]. At the meeting, Shattuck also gave Walters the remaining cards for which he had previously obtained employee signatures. By that time, there were nine cards signed by employees of the Company; those cards were introduced in evidence by the Board's General Counsel at the trial [C-4 n.5]. All these cards were either signed prior to or at the meeting at Shattuck's house on November 13.[6]

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[6]The cards in evidence are as follows: 2-A, Joseph Schetrompf; 2-B, Frederick Little; 2-C, William Leisenring; 2-D, William Shattuck; 2-E, Hector Caraballo; 2-F, Harold McAllister; 2-G, Orville Dates; 2-H, Ernest Tillman; 2-I, Ross Wilck.

On November 28, 1979, Walters went to the Company's offices around 2:00 or 2:15 p.m. He asked to see Phil Haers [C-4]. Walters was told that Phil Haers, Sr. (Philemon Haers) was in.[7] After Walters identified himself, he was shown into Phil Haers, Sr.'s office and met with him alone. Walters told Haers that he had signed authorizations from employees and wanted to represent the Company's production and maintenance employees [C-4]. The two men discussed the options of an election or voluntary recognition. Walters told Haers that secretaries, clericals and sales people were not going to be in the collective bargaining unit. About 45 minutes after the meeting started, Haers asked to see the authorization cards. Walters placed the cards on Haers' desk and Haers reviewed them [C-5].

At that time Philip Haers, Jr. entered the office.[8] Walters told Haers, Jr. that the Union represented a majority of the employees, had the authorization cards and wanted to negotiate a contract [C-5]. The Haers discussed back and forth whether they should voluntarily recognize the Union or have an election. They both went through the cards again and brought in the payroll clerk to check the payroll records [C-6]. There was discussion concerning who the unit employees would be. Walters read off a list of names he had compiled of the men who worked in the unit he was seeking.[9]

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[7]The correct name is Philemon Haers, commonly referred to as Phil Haers Sr., to distinguish him from his son, Philip Haers, who is referred to as Phil Haers, Jr. Philemon Haers, Sr. was at that time and is now Chairman of the Company's Board of Directors, and was in the plant every day [C-4 n.5].

[8]Philip Haers, Jr. is President of Phelps and serves on its Board of Directors.

[9]The names that were stated as being in the unit are all those on the list except Van Doyen, who in fact was not employed by Phelps, James Tillman, who had quit [C-6 to C-7], Earl Hence, a salesman, Hundley, a stipulated supervisor, and Burmaster, partially retired and identified as not being in the unit.

Walters read the list of his names to the payroll clerk who verified that they were employees.[10] Walters identified the garage mechanics, yard workmen, plant people and drivers as the people on the list and in the unit. Walters reiterated that supervisors, secretaries, clericals, salesmen and immediate family members were not part of the unit. The parties agreed on the employees who were in the unit.[11]

Walters and the Haers then discussed the negotiations for a contract. Phil Haers, Jr. expressed concern over beginning negotiations during the Company's busy season immediately prior to the Christmas holidays. He said that he would like negotiations to begin, if possible, in January or February. He also requested that negotiations be conducted during the evening so as not to interfere with business [C-7]. Walters said that by the time he had assembled an employee bargaining committee, and had formulated and forwarded their contract proposals to the Company, with an opportunity for the Haers to review those proposals, it would probably be after the first of the year [C-7]. Walters emphasized that he did not want to interfere with the Company's operations.

Walters then asked for written information on the Company's existing employee benefit plans. Haers, Jr. promised to try to locate an extra copy of the Company's pension, profit sharing and welfare plans and forward them to Walters [C-8]. It was agreed that the Union would prepare some proposals after talking with the employees and that negotiations would begin when Walters got the proposals together. The men shook hands on it and Walters left.

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[10]Philip Haers, Jr. verified that the unit employees — Smith, Stone, Sapp, Rieke, Jaycox, Suwyn, Schetrompf, McAllister, Caraballo, Shattuck, Dates, Leisenring, Ernest Tillman, Wilck, and Little were all employed by Phelps on November 28, 1979.

[11]There are fifteen employees identified by name as being in the unit. Walters testified that Haers Sr. referred to the number sixteen as the number of people employed by Phelps, but the identity of a sixteenth employee is unclear [C-7 n.8]. In any event, at the end of the meeting there was no question left as to who was in or out of the unit — "mechanics, yard people, plant workers and drivers. That was the unit."

The following morning, Phil Haers, Jr. called Walters and told him that the Company's Board of Directors had a meeting and had changed their mind and wanted an election. Walters told Haers, Jr. that he did not think the Company could do that at this point and told him that he would be contacting his attorney. The original charge was filed with the Board shortly thereafter.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court's discretionary review of decisions of the United States Courts of Appeals by writ of certiorari is generally limited to cases: where there is a conflict among the circuits on the same matter; where an important issue of federal law is presented which has not been, but should be, settled by this Court; or where a federal question has been decided in a way that conflicts with applicable decisions of this Court.[12] As more fully discussed hereinafter, the above reasons for granting certiorari are totally absent in the instant case. It is submitted, therefore, that there is no legal issue warranting certiorari.

First, there is no conflict among the circuits on an issue herein. The Second Circuit enforced the Board's decision that the Company had voluntarily recognized the Union and, thereafter, unlawfully withdrew recognition in violation of Sections 8(a) (1) and 8(a) (5) of the NLRA. That decision fully accords with decisions of the other courts of appeals. The circuit courts have uniformly enforced the established Board rule that once an employer recognizes a union as the exclusive bargaining representative of its employees, it is a violation of the Act to withdraw recognition before a reasonable effort has been made to bargain.[13] Moreover, the Second Circuit's refusal

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[12] *See* Rule 19(b)(1) of the Supreme Court Rules.

[13] *Lyon & Ryan Ford, Inc.*, 647 F.2d 745 (7th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (1981); *Jerr-Dan Corp.*, 601 F.2d 578 (3d Cir. 1979), *enf'g* 237 NLRB 302 (1978); *NLRB v. Brown & Connolly, Inc.*, 593 F.2d 1373 (1st Cir. 1979); *NLRB v. Gogin*, 575 F.2d 596 (7th Cir. 1978); *NLRB v. Broad Street Hospital*, 452 F.2d 302 (3d Cir. 1971); *NLRB v. San Clemente Publishing Corp.*, 408 F.2d 367 (9th Cir. 1969).

to review or interfere with the Board's rule on voluntary recognition is consistent with this Court's admonition against judicial interference in matters of national labor policy.[14]

Second, there is no important question of federal law which has not been, but should be, settled by this Court. The Second Circuit granted enforcement of the Board's order based on its finding that the order was supported, on the entire record, by substantial evidence. The applicability of the substantial evidence standard to court review of Board decisions is specifically provided for in the Act.[15] and has been recognized and followed by this Court for more than thirty years.[16]

Third, the Court of Appeals' decision fully accords with previous decisions of this Court. Indeed, the Company's argument, rejected by the court below, that a special evidentiary test should be applied in voluntary recognition cases is directly contrary to this Court's decision in *NLRB v. Walton Manufacturing Co.*[17]

Finally, the decision in this case turned solely on the evaluation of testimony of the various witnesses. Since the Court of Appeals' upholding of the Administrative Law Judge's credibility findings is consistent with the established scope of judicial review and is fully supported by the record, review by this Court is not appropriate.[18]

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[14] *Phelps Dodge v. NLRB*, 313 U.S. 177, 194 (1941).

[15] 29 U.S.C. §160(e).

[16] *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

[17] 369 U.S. 404 (1962).

[18] *See NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

ARGUMENT

POINT I

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW IN ENFORCING THE BOARD'S ORDER.

It is established law that decisions of the National Labor Relations Board are entitled to enforcement by the courts of appeals if supported by substantial evidence on the record considered as a whole. In the instant case, the Court of Appeals granted enforcement based on its determination that the Board's order was, on the entire record, supported by substantial evidence. Thus, since the court below properly applied the congressionally mandated standard of review in enforcing the Board's order, the petition for writ of certiorari must be denied.

In drafting the National Labor Relations Act,[19] Congress specifically limited the scope of judicial review of Board decisions. Pursuant to the Act, so long as the Board's findings are supported on the entire record by substantial evidence, the reviewing court is without power to set aside the Board's decision. Thus, Section 10(e) of the Act provides, in part, that:

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.[20]

In *Universal Camera Corp. v. NLRB*,[21] this Court, upon reviewing the legislative history and background underlying the

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[19] 29 U.S.C. §§141 *et. seq.*

[20] 29 U.S.C. ¶160(e).

[21] 340 U.S. 474 (1951).

statutorily prescribed substantial evidence standard, explained that:

> *To be sure the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.* Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.[22]

In applying the standard of review articulated in *Universal Camera*, the Court of Appeals found that "the Board's . . . conclusion that the Company voluntarily recognized the union is supported by substantial evidence" [A-3]. Although apparently not disputing that the Board's decision is supported by substantial evidence, the Company urges that this Court disregard the substantial evidence test and impose a more onerous burden of proof in voluntary recognition cases. Thus, the Company seeks a rule requiring that the Board adduce "clear and convincing" evidence to support a finding of voluntary recognition.

The Company's argument for imposition of a special rule concerning the weight of the evidence necessary to sustain a

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[22] *Id.* at 488 [emphasis supplied]. The Court in *Universal Camera* had previously held that the "substantial evidence" standard of proof required of Board decisions by the National Labor Relations Act, as amended, is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act, 5 U.S.C. §1001 *et seq.* *Id.* at 487.

Board order of voluntary recognition is without merit. In *NLRB v. Walton Manufacturing Co.*,[23] this Court specifically rejected imposition of a similar special rule in reinstatement cases and held that the substantial evidence standard articulated in *Universal Camera* is applicable without exception to review of all Board decisions. In *Walton*, the Court rejected a special evidentiary rule applied by the United States Court of Appeals for the Fifth Circuit in reviewing Board orders involving reinstatement with back pay.[24] Finding such a special

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[23]369 U.S. 404 (1962).

[24]The Fifth Circuit's special evidentiary rule in reinstatement cases was first announced in *NLRB v. Tex-O-Kan F. Mills Co.*, 122 F.2d 433 (1941). In that case, the court said that a cease-and-desist order generally "costs no money and only warns to observe a right which already existed; evidence short of demonstration may easily justify such an order. *Id.* at 438. But the court established a stricter rule for reinstatement cases:

> Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough. The duty to weigh and test the evidence is of course on the Board. This court may not overrule a fact conclusion supported by substantial evidence, even though we deem it incorrect under all the evidence. . . . In the matters now concerning us, the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to reemploy in each instance. There is no doubt that each employee here making complaint was discharged, or if laid off was not reemployed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true and the discharger knows the real cause of discharge, it is a fact to which he may swear. *If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point.*

Id. at 438-39 [emphasis supplied].

rule impermissible, this Court declared that:

> There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases. *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, and the *Universal Camera Corp.* case state a rule for review by the Courts of Appeal in all Labor Board cases.[25]

Additionally, as held by the court below, the Company's argument that policy considerations justify judicial abrogation of the Board's rule regarding informal recognition is without support.[26] In *Phelps Dodge Corp. v. NLRB*,[27] this Court cautioned against judicial intrusion into the area of Board policy. The Court said:

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empirical process of administration. The exercise of the process was committed to the Board, subject to limited judicial review.

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[25] 369 U.S. at 407.

[26] In rejecting the Company's argument that policy considerations favoring the electoral process warrant imposition of a more stringent evidentiary rule to support a Board finding of voluntary recognition, the Court of Appeals said that:

> There is, moreover, no basis on which we can review the Board's policy. The company points to no statute that the Board's rule violates, and no indication that the Board lacks authority to adhere to the rule. "[W]e consider such policy matters . . . to be outside our province."

A-4 to A-5 [*quoting NLRB v. Brown and Connolly, Inc.*, 593 F.2d 1373, 1374 (1st Cir. 1979)].

[27] 313 U.S. 177 (1941).

> *Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.*[28]

It is clear that, pursuant to this Court's decisions in *Universal Camera* and *Walton Manufacturing*, the Company's argument for application of a more stringent evidentiary standard in voluntary recognition cases was properly rejected by the court below. Accordingly, since the Court of Appeals applied the correct standard of review — the substantial evidence test — in enforcing the Board's order, the petition for writ of certiorari should be denied.

POINT II

THE COURT OF APPEALS CORRECTLY FOUND THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE BOARD'S DETERMINATION THAT THE COMPANY HAD RECOGNIZED THE UNION AS BARGAINING REPRESENTATIVE FOR AN AGREED UPON UNIT.

More than three decades ago, in *Universal Camera Corp. v. NLRB*,[29] this Court articulated the very narrow circumstances in which certiorari would be granted to review a Court of Appeals' decision to grant or deny enforcement of a Board order. The Court observed that:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.[30]

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[28] *Id.* at 194 [emphasis supplied].

[29] 340 U.S. 474 (1951).

[30] *Id.* at 490-91.

Similarly, in *NLRB v. Pittsburgh Steamship Co.*,[31] decided the same day as *Universal Camera*, the Court emphasized that it would not review decisions, such as that in the instant case, turning solely on evaluation of testimony. The Court explained that:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals . . . finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."[32]

In the instant case, the determination of whether the Company agreed to recognize the Union turned on whose testimony was to be credited. The administrative law judge, confronted with two conflicting versions of events, credited the testimony of Union Representative Walters over that of the Company's witnesses. In a similar situation, the court in *NLRB v. Gogin*[33] refused to disturb the Board's credibility findings. The court enforced the Board's order that the employer refused to bargain with a union that possessed authorization cards from a majority of unit employees, by withdrawing recognition previously granted to the union in a telephone conversation between the union representative and the employer's attorney.[34]

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[31] 340 U.S. 498 (1951).

[32] *Id.* [quoting *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927)].

[33] 575 F.2d 596 (7th Cir. 1978).

[34] *Id.* at 605.

The employer contended that the Board should not have credited the testimony of the union representative over the testimony of the company's witness. The court summarily rejected that invitation:

> The company asks this court to disturb the findings of the Board in crediting the testimony of [the union representative] over that of [the company] Attorney Hauer. We decline to do so on the basis that absent exceptional circumstances, such resolutions are within the province of the trier of the fact, and will not be disturbed on review.[35]

In the instant case, the crediting of Walters' testimony over that of the Haers is fully supported by the record. The testimony of Phil Haers Sr. and Jr. was at times incredible, conflicting and inconsistent. Moreover, their counsel attempted to lead them in critical areas.[36] Conversely, Walters' testimony, credited by the Judge, was given in direct fashion without leading questions. Also, contrary to the Company's contention, Walters' recollection was not incomplete or vague. He never claimed that the Company's recognition was given in the explicit words that it "hereby recognizes the Union." Rather, he testified forthrightly to all that was discussed in the meeting, concluding with the discussion about the negotiations. Bargaining, of course, presumes recognition. The Company's arguments about the form the grant of recognition took would

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[35] *Id.; accord, NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952); *see, also, NLRB v. Stark*, 525 F.2d 422, 425-26 (2d Cir. 1975); *Amalgamated Local 355 v. NLRB*, 481 F.2d 996, 1005 (2d Cir. 1973); *NLRB v. Warrenburg Board & Paper Corp.*, 340 F.2d 920, 922 (2d Cir. 1965).

[36] Contrary to the Company's contention, the Administrative Law Judge correctly noted that Philemon Haers, Sr. "omitted any detailed reference to [a] substantial segment of the [meeting on November 28], until elicited by Respondent's counsel by a leading question" [C-9]. The record fully supports that conclusion.

require a degree of formality in the recognition process repeatedly rejected by the courts.[37]

Also, the Company's contention that the Board's order should not be enforced because the Judge refused to allow cross-examination about a conversation between Walters and the Union's attorney, subsequent to the meeting between Walters and the Haers on November 28, is without merit. The Judge's findings, adopted by the Board, that the Company recognized the Union, and his crediting of Walters over the Haers, were based on a comparison of their testimony about the November 28 meeting. Testimony about events and conversations after the meeting was limited by the Judge, and the limitations applied to the General Counsel and the Union as well as the Company. The subsequent events were not relied on by the Judge in making his fact resolutions.

Other complaints by the Company about the conduct of the hearing and alleged improper limiting of questioning by the Company's counsel are equally without merit. The Judge would not allow the Company's counsel to question Union Business Representative Walters about previous organizing activities. This line of questioning, however, was outside the scope of direct examination and unrelated to the events at issue. The Judge restricted the other parties in the same fashion. Thus, he would not allow the Union to cross-examine Philemon Haers as to his familiarity with unions, notwithstanding his testimony on direct examination that he did not know how to

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[37] *NLRB v. Broad Street Hospital*, 452 F.2d 302, 304-05 (3d Cir. 1971); *NLRB v. Brown & Connolly*, 593 F.2d 1373, 1374 (1st Cir. 1979). In *Brown & Connolly*, the Board found that the arrangement of a meeting to begin negotiations, as occurred in this case, left no doubt that the employer had, in fact, accepted the representative status of the union. 237 NLRB 271, 275 (1978).

The Board, with court approval, has long rejected the argument that collective bargaining contracts must be formally attested by the parties. In *Conway's Express v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952), the court noted:

> §8(d) [29 U.S.C. §158(d)], codifying the rule of H.J. Heinz Co. v. NLRB, 311 U.S. 514, specifically provides for a written agreement "if requested by either party" — clear evidence that a writing is not mandatory as a matter of law.

deal with the Union's request for recognition because it was a "new thing" and they had not had union activity "there" for 22 years.

The record in this case plainly contains substantial evidence to support the Board's determination that the Company recognized the Union. Moreover, the Company has failed to demonstrate that the Administrative Law Judge's credibility findings were contradicted by documentary evidence or were otherwise improper. Accordingly, the Court of Appeals' enforcement of the Board's order was proper and the petition for certiorari should, therefore, be denied.

POINT III

AS FOUND BY THE COURT BELOW, THE BOARD PROPERLY DETERMINED THAT THE COMPANY'S ACTIONS VIOLATED SECTIONS 8(a) (5) AND (1) OF THE ACT.

The Board has repeatedly held, with court approval, that oral recognition of a collective bargaining representative is as effective as Board certification, and that such oral recognition must be enforced. Accordingly, in the instant case, the Company's repudiation of its prior oral recognition of the Union was in violation of the Act.

In *NLRB v. Broad Street Hospital*,[38] the court affirmed a Board finding that the employer violated the Act by withdrawing recognition of the union it had orally recognized. The court noted that the issue involved "the weighing of two conflicting goals of national labor policy: preserving employees' free choice of bargaining representatives, and providing stability for established bargaining relationships." The court found that, in such a situation, "'the Board should be left free to utilize its administrative expertise in striking the proper balance.'"[39] The court noted the different con-

[38] 452 F.2d 302 (3rd Cir. 1971).

[39] *Id.* at 304, citing its previous decision in *NLRB v. Frick Co.*, 423 F.2d 1327 (3d Cir. 1970).

siderations involved, and concluded that the danger of instability in bargaining relationships was paramount.[40] The court also concluded that "the objectives of our national labor policy [would be] thwarted . . . if the judiciary were to impose formalisms in the recognition process not deemed necessary by the Board. . . . So long as the Board is willing and able to determine the *fact* of recognition from the entire record, the judiciary should not dilute the efficacy of the Board's action."[41]

The views of the court in *Broad Street Hospital* were adhered to by the Second Circuit in *NLRB v. Lasaponara & Sons*,[42] reiterating that "[o]nce a collective bargaining agent is

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[40]The Third Circuit in *Broad Street Hospital* stated that:

> We respect the fundamental principles that employees should be given maximum opportunity to select or reject bargaining representatives, and that trade union representation must reflect the will of the bargaining unit fairly achieved through democratic processes. Indeed, it is unrealistic not to recognize that there are points in time in a given labor dispute when a particular union can be said to have lost its majority status. . . .
>
> However, it is precisely under such conditions that the dangers of instability, wrought by the absence of an established bargaining unit, are most severe. Thus, whether the employer's bona fide recognition of a union's majority status be oral or written, it must be binding for the same reasons we enunciated in Frick: the inability of all parties to the collective bargaining process to rely on such recognition would produce an uncertainty potentially generative of strife and discord in industrial relations. Furthermore, the very real possibility of employer interferences with established majority status would exist. In fact, in implementing the congressional prohibition against unfair labor practices, the Board, with Supreme Court approval, "many times has expressed the view that unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944).

452 F.2d at 304-05.

[41]*Id.* at 305.

[42]541 F.2d 992, 995 (2d Cir. 1976), *cert. denied*, 430 U.S. 914 (1977).

voluntarily recognized by an employer as the representative of its employees, the bargaining relationship must be permitted to continue and recognition may not be withdrawn at will."

Similarly, in *NLRB v. Brown & Connolly, Inc.*,[43] the court recognized, consistent with the above decisions, that "if the employer once recognizes a majority union, no matter how informally, the Board holds that the right [to require an election] is lost."[44] In *Brown & Connolly*, the employer orally recognized the union after he was confronted by eleven of his seventeen employees, with two union organizers, who appeared at his office, unannounced and wearing union buttons. The Board found that this was a demonstrable showing of majority status, rejecting the arguments that there was no meeting of the minds at the meeting and no agreement by the employer to enter into a collective bargaining relationship.

In finding a violation in the instant case, the Board relied on its previous decisions in *Lyon & Ryan Ford, Inc.*,[45] and *Jerr-Dan Corp.*,[46] both of which have since been enforced by the circuit courts. The Board in *Jerr-Dan* rejected the conclusion of the administrative law judge that recognition ought to be reduced to writing or accompanied by unambiguous objective conduct confirming the recognition, such as the actual entry into contract negotiations, before a violation should be found in a party's withdrawal from that recognition.[47] Since credited testimony in *Jerr-Dan* showed the employer's recognition of

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[43] 593 F.2d 1373 (1st Cir. 1979).

[44] *Id.* at 1374.

[45] 246 NLRB 1 (1979), *enf'd*, 647 F.2d 745 (7th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (1981).

[46] 237 NLRB 302 (1978), *enf'd in unpublished opinion*, 601 F.2d 578 (3d Cir. 1979).

[47] *Id.* at 302.

the union, it was sufficient to show a violation of the Act.[48] The Board held that no further evidence was necessary:

> [T]he key is the original commitment of the employer to bargain upon some demonstrable showing of majority. That showing was made here by the union and that commitment was made by respondent when it agreed to begin bargaining. Once that commitment was made, respondent could not unilaterally withdraw its recognition and to do so was a violation of the Act.[49]

In *Jerr-Dan*, as in the instant case, there was an initial recognition of the union by the employer and agreement to begin bargaining; but on the day following that recognition, the employer notified the union that it doubted the union's majority status, questioned the authorization cards and raised doubts as to the appropriate unit. The Third Circuit upheld the Board's determination that such a withdrawal of recognition constituted a violation of Section 8(a) (5) of the Act.

In the instant case, the credible evidence shows that on Nove..ber 28, 1979, the Company, by its officers Philemon Haers and Philip Haers, Jr., recognized and agreed to bargain with the Union, upon a demonstrable showing of majority status — the signed authorization cards — in an agreed upon unit consisting of named garage employees, truck drivers, plant employees, yard employees and excluding supervisors, salesmen, clericals and Haers' family members. Philemon Haers and Philip Haers, Jr. reviewed the signed authorization cards and accepted their authenticity. Immediately thereafter, the parties agreed to commence negotiations after the Union forwarded its contract proposals.

The Company's contention that the Board decision is repugnant to the national labor policy favoring free choice in NLRB elections is misplaced. That policy is inapplicable in a situation where recognition has already been afforded. As

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[48] *Id.* at 303 n.9.

[49] *Id.* at 303.

recently pointed out by the court in *NLRB v. Lyon & Ryan Ford*,[50] an election is not the only method by which a bargaining relationship can be established, and, that:

> [a]n employer's voluntary recognition of a majority union remains 'a favored element of national labor policy.' *NLRB v. Broadmoore Lumber Co.*, 578 F.2d 238, 241, 98 LRRM 3134 (9th Cir. 1978). An employer who has not committed unfair labor practices and has not recognized a union has the right to require an election regardless of the union's showing of majority status. *But once the employer recognizes the union, no matter how informally, he loses the right to require an election.*[51]

Since the Company voluntarily recognized the Union, its contention that this Court's decision in *Linden Lumber*[52] requires reversal of the Board's decision in this case is totally misplaced. The Court in *Linden Lumber* carefully noted that the employer and union "had never voluntarily agreed upon any mutually acceptable and legally permissible means other than a Board-conducted election for resolving the issue of union majority status."[53] As indicated by the numerous voluntary recognition cases decided by the Board and enforced by the Courts of Appeals since *Linden*, that decision is inapplicable to this situation.

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[50] 647 F.2d 745 (7th Cir. 1981).

[51] *Id.* at 750-51 [emphasis supplied].

[52] *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974).

[53] *Id.* at 310 n.10.

POINT IV

THE BOARD PROPERLY DETERMINED THE APPROPRIATE UNIT IS THE ONE IN WHICH THE UNION WAS RECOGNIZED BY THE COMPANY.

The Company contends that the Board's order must be reversed because the Board failed to make a determination of the appropriate bargaining unit. That contention is incorrect. The Board specifically found that the unit discussed in the November 28 meeting was an agreed upon unit and, therefore, appropriate.

This Court has long recognized that determination of an appropriate bargaining unit is within the sound discretion of the Board. Accordingly, unless the Board's unit determination is so unreasonable and arbitrary as to exceed its power, the determination may not be disturbed by the courts. Thus, in *Packard Motor Car Co. v. NLRB*,[54] this Court held that:

> The issue as to what unit is appropriate for bargaining is one for which no absolute law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed.[55]

The Board's deferring to the parties' agreed upon unit in this case was fully consistent with long-standing Board policy. The Board has repeatedly held that the unit agreed upon is to be respected and is controlling.[56] In the instant case, the Board found that the Company recognized the Union as the representative of employees in a unit consisting of garage employees, truck drivers, plant employees and yard employees.

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[54] 330 U.S. 485 (1947).

[55] *Id.* at 491; *see South Prairie Construction Co. v. Engineers*, 425 U.S. 800, 805 (1976).

[56] *R.L. Sweet Lumber Co.*, 207 NLRB 529, 535 (1973), *enf'd* 515 F.2d 785 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975); *Buckley Southland Oil*, 210 NLRB No. 145 (1974); *Ref-Chem Co.*, 169 NLRB 376, 380 (1968), *enforcement denied on other grounds*, 418 F.2d 127 (5th Cir. 1969); *NLRB v. Royal Oak Tool & Machine Co.*, 320 F.2d 77 (6th Cir. 1963).

Since this is the "unit in which the Union was afforded recognition," it is "unquestionably appropriate."[57]

Furthermore, the unit is one traditionally recognized by the Board as appropriate, being a production and maintenance unit. In conjunction with the parties' agreement on the classifications involved, the employees in the unit were identified by name: Harold Smith and Wayne Stone, mechanics; Fred Sapp, Thomas Ricke, Walter Jaycox, Issac Suwyn, Joseph Schetrompf, and Harold McAllister, truck drivers; Hector Caraballo, William Shattuck and Orville Dates, plant employees who work in the actual manufacturing of the block; and yard employees William Leisenring, Ernest Tillman, Ross Wilck and Fred Little. Excluded from the unit were Eric Van Doyen (who was employed by another Haers' owned company), James Tillman (who had quit the Company), and the three men (Hundly, Burmaster and Hence) identified as supervisor, salesman, and retired. When the meeting was over, there was no question as to who was going to be in the unit or out of the unit; the unit was going to consist of *mechanics, yard people, plant workers and drivers*.

It is clear that, of the employees identified as comprising the unit, the Union had a majority signed to authorization cards. The Union "clearly defined the unit it sought to represent" — mechanics, yard people, plant workers and drivers — "and made a bargaining demand on the basis of authorization cards from a majority of employees in those categories."[58] The failure to identify by name an individual employee in that unit cannot serve to avoid the Company's bargaining obligation.[59]

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[57] *Ref-Chem Co.*, 169 NLRB 376, 380 (1968).

[58] *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d at 752.

[59] In *Lyon & Ryan Ford*, the Seventh Circuit held that:

> The fact that the parties failed to agree on the inclusion within the unit of two employees does not necessarily prove that the parties failed to agree substantially on the definition or scope of the unit.

Id.

Since the Board's determination that the Company recognized the Union in an appropriate agreed upon unit fully accords with established Board policy, that determination may not be disturbed.

CONCLUSION

For all of the foregoing reasons and authorities, the court below correctly concluded that the Board's order was supported by substantial evidence and, accordingly, enforced that order. The petition for writ of certiorari, therefore, should be denied.

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